

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

NO. 2:14-cr-00030-SAB

UNITED STATES OF AMERICA,

Plaintiff,

v.

RANDY ZACHERLE,

Defendant.

**ORDER RE: DOUBLE  
JEOPARDY; DENYING  
MOTION FOR NEW TRIAL**

On November 3, 2014, Defendant was convicted by a jury of two counts: (1) Receipt of Child Pornography; and (2) Possession of Child Pornography. Prior to trial, Defendant raised the double jeopardy issue, arguing the Government needed to pick between the two counts, since possession of child pornography is a lesser-included offense. The Court reviewed the case law and determined that both counts should go to the jury, and then at the time of sentencing, one of the counts would be vacated.

The parties requested that the Court determine which count would be vacated prior to the actual sentencing hearing. Consequently, a hearing was held on May 14, 2015. Defendant was present and represented by Douglas Phelps. The United States was represented by Stephanie Lister. Also, before the Court was Defendant's Motion for New Trial, ECF No. 102.

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**ORDER RE: DOUBLE JEOPARDY; DENYING MOTION FOR NEW TRIAL ~ 1**

1 **A. Double Jeopardy**

2 The parties are in agreement that if the Court were to sentence Defendant on  
3 both counts of conviction, double jeopardy concerns would arise because  
4 Possession of Child Pornography is a lesser-included offense of Receipt of Child  
5 Pornography. *See United States v. Davenport*, 519 F.3d 940 (9<sup>th</sup> Cir. 2008). The  
6 Ninth Circuit has instructed that when a defendant is convicted of both possession  
7 and receipt/distribution of child pornography, and the charges are predicated on  
8 the same set of images, the district court must exercise its discretion to determine  
9 which one of the two counts to dismiss. *United States v. Maier* 646 F.3d 1148,  
10 1154 (9<sup>th</sup> Cir. 2011) (“The choice of which count to vacate is fundamentally a  
11 sentencing decision.”). It also instructed that the court should consider the 18  
12 U.S.C. §3553(a) factors in exercising its discretion. *Id.*

13 This is a close call. There are a number of factors that support vacating the  
14 lesser-included offense of Possession of Child Pornography. Defendant has a  
15 history of behavior which is very concerning and suggests that he is a danger to  
16 the public and to young girls. He has had at least one incident, if not two, with his  
17 niece that is very concerning. This is his second conviction for child pornography.  
18 He possessed a very large number of photographs, and took steps to conceal his  
19 behavior. His criminal history is lengthy and spans over two decades. These  
20 concerns, however, can be addressed by at the very least the minimum 10-year  
21 sentence mandated by the possession conviction.

22 Moreover, Defendant is 55 years old and has significant health issues. A  
23 mandatory minimum sentence of 15 years would mean that Defendant would be  
24 close to 70 years old when he is released from prison. It is not the Court’s  
25 intention to sentence Defendant to a lifetime imprisonment. A 15-year minimum  
26 sentence is greater than necessary to meet the sentencing goals set forth in § 3553.

27 Consequently, the Court finds that Defendant’s age and health concerns  
28 provide unusual circumstances and compelling reasons to vacate the Receipt of

1 Child Pornography conviction. Defendant will be sentenced based on the lesser-  
2 included Possession of Child Pornography conviction, and not the Receipt of  
3 Child Pornography conviction.

4 **B. Defendant's Motion for New Trial**

5 Defendant moves for a new trial for three reasons: (1) a Fourth Amendment  
6 violation; (2) an *Alleyne* violation; and (3) a *Miranda* violation. In its response, the  
7 United States asserts that Defendant's Motion is untimely. The Court agrees.  
8 However, in the interests of justice, the Court will proceed to the merits of the  
9 motion.

10 **(1) Fourth Amendment**

11 Defendant argues that a new trial should be granted due to the admittance of  
12 computer evidence that was obtained in violation of Defendant's Fourth  
13 Amendment rights. Defendant bases his argument on his expectation of privacy in  
14 the computer. Judge VanSickle ruled that Defendant abandoned any rights he had  
15 to the computer. Defendant has not shown that this ruling was in error.

16 **(2) Alleyne Violation**

17 Defendant argues the jury is required to determine the number of depictions,  
18 the presence of videos, and if the images were of prepubescent children.  
19 Defendant also brought this issue up at trial and the Court held that because the  
20 number of depictions, presence of videos, or the age of the minor children does not  
21 increase the statutory mandatory minimum or maximum sentence, the jury was not  
22 required to make these factual findings. This ruling is consistent with case law.  
23 *See United States v. Vallejos*, 742 F.3d 902 (9th Cir. 2014). In *Vallejos*, the  
24 defendant argued the district court could not impose an enhancement for  
25 distribution because the jury found him guilty of receipt. *Id.* at 906. The Circuit  
26 held that because the distribution element affected neither the statutory maximum  
27 sentence nor any mandatory minimum sentence, neither *Apprendi* nor *Alleyne*  
28 applied. *See also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than

1 the fact of a prior conviction, any fact that increases the penalty for a crime  
2 beyond the prescribed statutory maximum must be submitted to a jury, and proved  
3 beyond a reasonable doubt.”).

4 Here, the sentencing enhancements (number of depictions, presence of  
5 videos, and age of children) do not result in a sentence that exceeds the statutory  
6 maximum sentence. As such, it is up to the Court to determine whether the  
7 enhancement applies, not a jury. Defendant is not entitled to a new trial in order to  
8 have the jury determine his prior conviction, the number of depictions, the  
9 presence of videos, or determine if the images were of prepubescent children.

10 (3) ***Miranda* Violation**

11 Defendant argues that he should get a new trial because the Government let  
12 the jury know that he asserted his right to remain silent after being arrested and  
13 read his *Miranda* warnings.

14 The evidence at trial established that Defendant never invoked his right to  
15 remain silent unequivocally, and never stated that he did not want to answer any  
16 question he was asked by law enforcement. As such, the testimony about  
17 Defendant’s physical reaction to a question about child pornography on his  
18 computer drive was properly admissible during trial.

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Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Motion for New Trial, ECF No. 102, is **DENIED**.

2. The conviction for Count 1, Receipt of Child Pornography, is **vacated**.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to file this Order and provide copies to counsel and the U.S. Probation Office.

**DATED** this 15<sup>th</sup> day of May, 2015.



A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

Stanley A. Bastian  
United States District Judge